

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-220381 **DATE:** February 28, 1986
MATTER OF: Power Line Models, Inc.

DIGEST:

1. Protester has the burden of proving bias on the part of agency evaluators, and the General Accounting Office will not attribute unfair or prejudicial motives on the basis of inference or supposition.
2. Protest that pre-award acquisition of offeror by another firm performing work for the procuring agency established an organizational conflict of interest is without merit where the acquiring firm had no involvement in the development of the project being procured, so as to gain an unfair competitive advantage, and was not otherwise prohibited from seeking and performing the contract.
3. The determination of the relative merits of offerors competing for architect-engineer services is primarily the responsibility of the procuring agency, and the determination and award decision will not be disturbed unless it is arbitrary or in violation of procurement laws and regulations.

Power Line Models, Inc. protests the Department of Energy's selection of Uhl and Lopez Engineers, Inc. to perform engineering services in connection with the upgrade and expansion of an electrical power distribution system for the Los Alamos National Laboratory, Los Alamos, New Mexico. The protester alleges that there were a number of irregularities in the procurement.

We deny the protest.

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On July 13, 1985, the Department of Energy published in the Commerce Business Daily (CBD) a request for expressions of interest from engineering firms to perform investigations, studies, recommendations, design activities, and inspection during the construction phase of a restoration project for the Los Alamos power distribution system. The procurement was conducted under special procedures prescribed in the Brooks Act for the acquisition of architect-engineer services. See 40 U.S.C. §§ 541-54 (1982); Federal Acquisition Regulation (FAR) part 36 (FAC 84-5, Apr. 1, 1985). The CBD announcement stated that selection for negotiation and award would be based upon the following three criteria, listed in order of importance: (1) the firm (experience and technical competence in comparable work, success in meeting design schedules and estimating construction bid costs, and proposed project organization, delegation of authority, and assignment of responsibility); (2) the design team (proven capabilities in the field of electrical power distribution, and experience, technical expertise, and demonstrated competence in planning, design, testing, and inspection of complex electrical power distribution systems); and (3) project management (the experience and qualification of the project manager, and experience and management planning capability for similarly complex projects).

Nine firms submitted expressions of interest by the August 16 deadline, and the Department of Energy selected four for discussions. On October 7, the agency announced its selection of Uhl and Lopez for negotiation in accord with FAR, § 36.606. This protest followed; the Department of Energy has delayed award pending its resolution.

Biased Evaluation Panel

Power Line Models first questions whether Uhl and Lopez had an unfair advantage because of a prior relationship with the contracting office and the members of the evaluation panel. The procurement record establishes that the Department of Energy Los Alamos Area Office originally planned for the work to be performed under an existing contract with the Burns and Peters Group, with Uhl and Lopez participating as a subcontractor. The office reversed this decision after determining that the work was outside the scope of the Burns and Peters contract and that a sole-source award could not be justified. The agency acknowledges, however, that during the 6-month period before public announcement of the procurement, representatives of

Uhl and Lopez met with Department of Energy officials on at least three occasions to discuss the firm's qualifications and interest in the Los Alamos project.

The protester believes that it is unusual for the agency to hold three meetings with a prospective contractor and states that after the procurement was announced in the CBD, the Department of Energy denied its own request for a site visit because of staff limitations and the necessity of extending a similar opportunity to all interested firms. Power Line Models also argues that a fair selection could not be made by a panel including individuals who participated in the agency's plans to negotiate a sole-source contract that would have been contrary to provisions of the Competition in Contracting Act of 1984, 41 U.S.C.A. § 253 (West Supp. 1985).

Protesters have the burden of proving bias on the part of selection officials, and we will not attribute unfair or prejudicial motives to those officials on the basis of inference or supposition. Reliability Sciences, Inc., B-205754.2, June 7, 1983, 83-1 CPD ¶ 612. While three meetings with an interested firm to discuss a planned project may be unusual, the agency lists nearly a dozen engineering firms that visited the Los Alamos Area Office to discuss forthcoming work during the period in question here. We cannot say that the opportunities extended to Uhl and Lopez evidenced bias or constituted an impropriety on the part of the agency. See Kelsey-Seybold Clinic, P.A., B-217246, July 26, 1985, 85-2 CPD ¶ 90. Moreover, it is reasonable for agencies to restrict meetings with interested firms after a procurement has been announced in order to ensure that all prospective offerors are treated equally. We also do not believe that the role of selection panel members in the agency's initial consideration of having the work performed under an existing contract establishes bias in this new procurement. The protester's contention in this regard is mere speculation.

Organizational Conflict of Interest

The protester's second ground for protest concerns the acquisition of Uhl and Lopez by another architect-engineer firm, Holmes and Narver, Inc., which occurred on or about October 8, 1985. (Holmes and Narver performs work at the Los Alamos National Laboratory under a subcontract with the

University of California. Power Line Models believes that a potential conflict of interest exists because Uhl and Lopez may have gained access to information not available to other competitors.

After Department of Energy selection officials learned of the Uhl and Lopez acquisition, the agency investigated whether the subcontract under which Holmes and Narver worked at Los Alamos prohibited it from competing for the protested procurement. The agency also undertook to find out if the firm had participated in the developmental phase of the project in question and would have an unfair competitive advantage in follow-on work. The procurement record contains memoranda by the project engineer and the technical advisor to the selection panel, both of whom state that Holmes and Narver played no role in development of the current project. The Holmes and Narver subcontract only prohibits the firm from competing for follow-on services for work performed at Los Alamos under the University of California contract. Based upon this evidence, the chairman of the evaluation panel found that the acquisition of Uhl and Lopez by Holmes and Narver placed no bar upon the agency's contracting with the former in this case.

We agree. The mere fact of a prior or current contractual relationship does not in itself create an organizational conflict of interest. See Information Ventures, Inc., et al., B-219989 et al., Dec. 16, 1985, 85-2 CPD ¶ 668. Such a conflict exists where the nature of the work to be performed under a contract may, without some restriction on future activities, result in an unfair competitive advantage to the contractor. FAR, 48 C.F.R. § 9.501. We do not find that the acquisition of Uhl and Lopez created a potential organizational conflict of interest. Moreover, the Department of Energy has no obligation to equalize any competitive advantage that Uhl and Lopez may have gained through a previous relationship with Holmes and Narver that resulted in the acquisition. Advantages resulting from a firm's own particular business circumstances are not unfair unless they result from a preference by the contracting agency. See Information Ventures, Inc. et al., supra. We find no evidence of either a competitive advantage received by Uhl and Lopez or preference in the agency's consideration of the firm.

Evaluation

Power Line Models also contends that the selection of Uhl and Lopez was not based upon the evaluation criteria listed in the CBD announcement. Specifically, the protester believes that its own qualifications and experience in electric power engineering such as will be required under this contract far exceed those of Uhl and Lopez. Power Line Models also believes it was improperly downgraded for a lack of extensive prior work for the government and for its relatively small size. The protester argues that it has more specialists in electric power engineering comprising its design staff than does Uhl and Lopez.

In reviewing protests about an agency's selection of a contractor for architect-engineer services, our function is not to reevaluate the offeror's experience and capabilities or to make our own determination about the relative merits of competing firms. Rather, our review is limited to determining whether the agency's selection was reasonable, rather than arbitrary, and in accord with applicable statutes and regulations. See Y.T. Huang & Assoc., Inc., B-217122 et al., Feb. 21, 1985, 85-1 CPD ¶ 220. Additionally, the protester bears the burden of affirmatively proving its case, and the fact that a protester does not agree with an agency's evaluation does not render the evaluation unreasonable.

We have reviewed the procurement record, including the scoring sheets for each member of the evaluation panel. While the evaluators differed regarding the relative strengths and weaknesses of the competing firms, we cannot say that the selection of Uhl and Lopez had no reasonable basis. Power Line Models and Uhl and Lopez tied in total number of points awarded, and evaluators considered both their design teams and project management to have excellent qualifications. Since two out of three voting evaluation panel members ranked Uhl and Lopez first, however, the panel recommended that firm for selection.

The record shows that evaluators considered the size of Power Line Models' staff and the relative size of comparable projects previously undertaken by the firm to be minor weaknesses. While reasonable arguments can be made about this view, we cannot conclude that the final selection here was contrary to the evaluation criteria, arbitrary, or in violation of any statute or regulation.

The procurement record does not reflect any concern by evaluators about the relative amount of past work for the government, as opposed to commercial projects, by Power Line Models.

Finally, in its response to the agency report, the protester states that it learned that Uhl and Lopez contracted with an electrical engineer to conduct power system analyses relative to the Los Alamos project, using the facilities of a private utility, and "unofficially" provided the results to the Department of Energy. The protester states that this is evidence of a lack of expertise and capability by Uhl and Lopez, and would further have biased the evaluation panel because of the familiarity of Uhl and Lopez with the project. We do not agree that, if Uhl and Lopez sought independent analyses regarding the contract work, this necessarily establishes that the firm should have been rated lower than Power Line Models, and, as stated above, we find no evidence of bias in the evaluation record.

We deny the protest.

for Seymour E. Egan
for Harry R. Van Cleave
General Counsel